83 - 1558

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALTER D. ZANT, WARDEN,
Petitioner,

v.

HENRY WILLIS, III,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for the Petitioner

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTIONS PRESENTED

1.

Did the decision by the United States Court of Appeals for the Eleventh Circuit improperly amount to a conclusion that the Georgia statute concerning the use of peremptory challenges is unconstitutional and did the Eleventh Circuit Court of Appeals improperly conclude that the Respondent could inquire into the thought processes of the prosecutor in making such peremptory challenges?

2.

Did the decision by the Eleventh Circuit Court of Appeals allowing an evidentiary hearing as to the jury composition impermissibly establish a new category, that is, a particular age group, as an identifiable community group for purposes of jury selection?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. THE ELEVENTH CIRCUIT COURT OF APPEALS INCORRECTLY DIRECTED THAT AN EVIDENTIARY HEARING BE HELD REGARDING THE USE OF PEREMPTORY STRIKES BY THE PROSECUTION AS SUCH ACTION BY THE COURT AMOUNTS TO A DECLARATION THAT THE GEORGIA STATUTE PROVIDING FOR DISCRETIONARY PEREMPTORY CHALLENGES IS UNCONSTITUTIONAL AND THE COURT'S RULING CONSTITUTES IMPERMISSIBLE INTERFERENCE WITH THE THOUGHT PROCESSES OF THE PROSECUTOR	5
II. THE DECISION BY THE ELEVENTH CIRCUIT COURT OF APPEALS ALLOWING AN INQUIRY INTO THE COMPOSITION OF THE TRAVERSE JURY BASED ON YOUNG ADULTS IN THE POPULATION EXTENDS THE PRIOR HOLDINGS OF THIS COURT AND OTHER COURTS TO AN IMPERMISSIBLE LEVEL AND ESTABLISHES A NEW COGNIZABLE CLASS WHICH HAS NOT BEEN RECOGNIZED PREVIOUSLY	11
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Page(s)

Cases Cited:

Apodaca v. Orkin, 406 U.S. 404 (1972) 7

Barrow v. State, 239 Ga. 162, 236 S.E.2d 257 (1977) ... 11

Duren v. Missouri, 439 U.S. 357 (1979) 11, 12

Hamlin v. United States, 418 U.S. 87 (1974) 12

Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903 (1972) 6

Swain v. Alabama, 380 U.S. 202 (1965) 7

United States v. Ross, 468 F.2d 1213 (9th Cir. 1972) 12

Willis v. Balkcom, 451 U.S. 926 (1981) 3

Willis v. State, 243 Ga. 185, 253 S.E.2d 70, *cert. denied*, 444 U.S. 885 (1979) 3, 6, 11

Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983) 2, 4, 6, 11

Statutes Cited:

O.C.G.A. § 15-12-166; Ga. Code Ann. § 59-808 3

O.C.G.A. § 15-12-165; Ga. Code Ann. § 59-805 3

28 U.S.C. § 1241(1) 2

28 U.S.C. § 2403(b) 2

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALTER D. ZANT, WARDEN,
Petitioner,

v.

HENRY WILLIS, III,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Walter D. Zant, respectfully prays that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on November 17, 1983, and the denial of a timely motion for rehearing, entered on December 22, 1983.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals entered its opinion remanding the case to the district court for an evidentiary hearing on two issues on November 17, 1983. A copy of said opinion is included in the Appendix to this Petition and is reported as *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 17, 1983. *See Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983). A timely suggestion for rehearing en banc was filed, but denied by the court on December 22, 1983. This petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1241(1). Moreover, because the constitutionality of a Georgia code section may be drawn into question, 28 U.S.C. § 2403(b) may be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution:

> In all crimi[illegible] prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

O.C.G.A. § 15-12-165; Ga. Code Ann. § 59-805:

> Every person indicted for a crime or offense which may subject him to death or to imprisonment for not less than four years may peremptorily challenge twenty of the jurors impaneled to try him. Every person indicted for an offense which may subject him to imprisonment in a penal institution for any time less than four years may peremptorily challenge twelve of the jurors impaneled to try him. The state shall be allowed one-half the number of peremptory challenges allowed to the accused.

O.C.G.A. § 15-12-166; Ga. Code Ann. § 59-808:

> If a juror is found competent and is not challenged peremptorily by the state, he shall be put upon the accused. Unless he is challenged peremptorily by the accused, the juror shall be sworn to try the case.

STATEMENT OF THE CASE

Respondent, Henry Willis, III, was convicted of murder in January, 1978, in the Superior Court of Bleckley County, Georgia. Respondent was sentenced to death after a trial by jury. The conviction and sentence were affirmed by the Supreme Court of Georgia on direct appeal and certiorari was denied by this Court. *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, *cert. denied*, 444 U.S. 885 (1979).

A subsequent petition for a writ of habeas corpus was filed in the Superior Court of Tattnall County, Georgia, which petition was denied on August 29, 1980. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on November 13, 1980. A subsequent petition for a writ of certiorari was denied by this Court. *Willis v. Balkcom*, 451 U.S. 926 (1981).

Respondent Willis filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia. On April 29, 1982, the Magistrate entered a report and recommendation denying habeas corpus relief. The findings of fact and conclusions of law made by the Magistrate were adopted by the district court on September 21, 1982.

Respondent Willis subsequently appealed to the United States Court of Appeals from the denial of habeas corpus relief. On November 17, 1983, a panel of that court entered an order directing that the district court conduct an evidentiary hearing on two specific issues, that is the use of peremptory strikes by the district attorney and the composition of the traverse jury based upon young adults. *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983). Petitioner Zant filed a petition for rehearing and a suggestion for rehearing en banc challenging that decision. On December 20, 1983, rehearing was denied. Petitioner files the instant petition for a writ of certiorari challenging the decision of the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS INCORRECTLY DIRECTED THAT AN EVIDENTIARY HEARING BE HELD REGARDING THE USE OF PEREMPTORY STRIKES BY THE PROSECUTION AS SUCH ACTION BY THE COURT AMOUNTS TO A DECLARATION THAT THE GEORGIA STATUTE PROVIDING FOR DISCRETIONARY PEREMPTORY CHALLENGES IS UNCONSTITUTIONAL AND THE COURT'S RULING CONSTITUTES IMPERMISSIBLE INTERFERENCE WITH THE THOUGHT PROCESSES OF THE PROSECUTOR.

Respondent Willis challenged the prosecution's use of peremptory strikes at the trial and asserted that the prosecution had systematically excluded blacks by the use of peremptory strikes. The Magistrate concluded that Respondent could not show that the ten black jurors excluded at trial were not peremptorily challenged on grounds other than race. The Magistrate specifically found that the voir dire examination revealed sound tactical reasons for the use of each peremptory strike. The district judge adopted the report and recommendation of the Magistrate on all issues and declined to conduct an evidentiary hearing on this point.

On appeal to the Eleventh Circuit Court of Appeals, that court considered whether an evidentiary hearing should have been held. That court noted that the prosecutor used all ten peremptory challenges to strike the blacks presented as regular jurors and also utilized one strike to exclude a black being considered as an alternate juror. The Eleventh Circuit Court of Appeals noted that the Supreme Court of Georgia had ruled that as long as

the statute allowing peremptory challenges was valid, those challenges may be used at the discretion of counsel. *Willis v. Zant*, 720 F.2d at 1218; *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, 73 (1979).

The Supreme Court of Georgia considered this allegation on direct appeal and determined that it was without merit relying on its prior decision of *Hobbs v. State*, 229 Ga. 556, 560, 192 S.E.2d 903 (1972). Under that decision and under Georgia law, the peremptory challenge allows the parties to challenge a certain number of jurors "without the necessity of their showing any cause therefor. In the very nature of such a challenge no reason need be shown or assigned for the exercise of the right." *Hobbs v. State*, 229 Ga. at 560. Thus, under Georgia law the use of peremptory challenges is not to be examined as it is purely a matter of discretion for either party. The Supreme Court of Georgia concluded that the allegation was without merit based on prevailing Georgia law allowing peremptory challenges.

As noted by the Supreme Court of Georgia, a finding allowing an inquiry into the use of these peremptory challenges would defeat the entire purpose of a peremptory challenge. By its very nature, a peremptory challenge allows for the complete exercise of discretion by the attorney seeking to utilize such a challenge, and its use should warrant no inquiry into the reasoning behind such a discretionary challenge. Obviously, counsel in an adversary system are seeking to exclude persons from jury service who would be adverse to their position. Counsel may have any number of reasons for his or her decision. An inquiry into the use of peremptory challenges involves an attempt to reconstruct and evaluate the thought processes of an attorney at the time of trial.

Simply examining the record and concluding that an attorney happens to exclude black persons is insufficient to find that the attorney did not have other reasons which are justifiable for making the challenge. Furthermore, defense counsel and prosecutors alike may excuse persons of a particular race, religion or sex based on a decision that persons of that particular race, religion or sex would tend to be biased in favor of one party or the other.

This Court has long recognized that a criminal defendant is not constitutionally entitled to have a person of his own race on the jury that tries him. *Apodaca v. Orkin*, 406 U.S. 404, 413 (1972); *Swain v. Alabama*, 380 U.S. 202, 208 (1965). As under Georgia law the district attorney is entitled to exercise his peremptory challenges utilizing his own discretion and as a criminal defendant is not constitutionally entitled to have a person of his own race on the jury that tries him, Petitioner asserts that only by finding that the Georgia statute is unconstitutional may an inquiry be made into the thought processes behind a prosecutor's use of his peremptory challenges.

Even if this Court were to allow a hearing to determine if the prosecutor has systematically utilized his peremptory challenges in the past to exclude blacks from the jury, Petitioner asserts that this would not serve as a sufficient basis to overturn the conviction in the instant case; therefore, no evidentiary hearing is needed to make such a determination. The Magistrate specifically made a factual finding that there were obvious tactical reasons apparent from the voir dire transcript which would justify the exclusion by the prosecutor of those jurors challenged peremptorily. A review of the voir dire reveals

that during the striking of the twelve jurors, the district attorney struck seven women and three men and the defendant struck eighteen men with his peremptory strikes. The voir dire exhibits do not reflect the race of the fifty-six persons finally selected for the jury panel; however, after the voir dire examination, Respondent's counsel asked that the record reflect that the district attorney struck all ten blacks with his peremptory strikes. Thus, assuming that the statement by counsel was correct, the district attorney struck seven black women and three black men with his peremptory strikes and counsel for the Petitioner struck eighteen white men with his peremptory strikes.

A review of the voir dire of the veniremen excused by the district attorney reveals that the district attorney had sound tactical reasons for striking each of these potential jurors. Belinda Marshall, one of the ten veniremen struck by the district attorney, originally stated that she would not impose the death penalty under any circumstances. She later stated that she could consider the death penalty. Obviously, this ambiguity served as a basis for the challenge made by the district attorney.

Venireman Robert Lindsey originally stated that he was conscientiously opposed to capital punishment. Linda Ates was not necessarily in favor of capital punishment, but she was not absolutely against it. Rosetta Hobes testified that she was absolutely against capital punishment, would not vote to impose a death sentence upon the Respondent and would not vote for the death penalty regardless of the evidence. She later testified, however, that under some view of the evidence she might be able to impose the death sentence upon the Respondent. When asked if he were opposed to capital punishment, venire-

man Willie Ates replied, "yes and no." Ates said that there might be a case in which he could vote to impose the death penalty.

Martha Ridley Hobes originally stated she could not consider imposing the death penalty and that there was no case in which she could consider imposing a death sentence. She later said she "guessed" that she could vote to impose the death penalty. A review of this voir dire testimony clearly reflects that the district attorney utilized six of the ten peremptory strikes to challenge jurors who were opposed to some degree to the death penalty.

The remaining peremptory strikes also were used for sound tactical reasons. Martine Durham testified that she had been arrested by a policeman for disturbing the peace. Obviously, this could tend to prejudice the juror against police officers. Ulysses Donaldson testified that he had already formed an opinion in the case, although the transcript is not entirely clear as to which party Donaldson favored in his opinion. Winnie Carswell testified that if it were shown that the Respondent was high on marijuana when he committed the crime, she would believe that the Respondent did not know what he was doing.

The victim in the instant case was a police officer. This factor would be sufficient to establish that Ms. Durham would certainly have some reason for not being sympathetic to the police officer. Furthermore, as the Respondent testified he smoked marijuana prior to the murder, Winnie Carswell could well have been sympathetic to the Respondent had she been selected as a juror. Thus, there were sound tactical reasons for the exercise of these peremptory strikes.

Prospective juror Maggie McClendon worked at Middle Georgia College where Linda Ates was a student.

Even though Ms. Ates would probably have to drop out of college for a quarter if she were on the jury, she made no request to be excused. The district attorney could well have wondered why Ms. Ates expressed no reluctance about being on the jury and also could have wondered if Ms. McClendon and Ms. Ates had previously discussed the case while at Middle Georgia College. Therefore, it is clear that the district attorney had valid reasons for excusing both of these two jurors.

Given the testimony presented by the jurors on the voir dire examination in the instant case, Petitioner submits that the Magistrate was correct in his conclusion that the record supports a finding that the prosecutor had sound tactical reasons for utilizing each of his peremptory challenges outside of any racial considerations. As there are sound tactical reasons present for the utilization of these challenges, Petitioner submits that this Court should not allow the Respondent to inquire into the prosecutor's utilization of peremptory strikes in other cases, which inquiry would be irrelevant under these circumstances. Therefore, Respondent would urge this Court to grant certiorari as the Eleventh Circuit Court of Appeals has misconstrued this Court's decision in *Swain v. Alabama*, *supra*, so as to permit reconstruction and inquiry into the past thought processes of a district attorney even when there clearly exists a tactical basis for the use of the peremptory strikes apparent from the record. Furthermore, certiorari should be granted based on the clear conflict between the holding of the Supreme Court of Georgia and the holding of the Eleventh Circuit Court of Appeals and the fact that the decision by the Eleventh Circuit Court of Appeals clearly calls into question the constitutionality of the Georgia peremptory challenge procedure.

II. THE DECISION BY THE ELEVENTH CIRCUIT COURT OF APPEALS ALLOWING AN INQUIRY INTO THE COMPOSITION OF THE TRAVERSE JURY BASED ON YOUNG ADULTS IN THE POPULATION EXTENDS THE PRIOR HOLDINGS OF THIS COURT AND THE OTHER COURTS TO AN IMPERMISSIBLE LEVEL AND ESTABLISHES A NEW COGNIZABLE CLASS WHICH HAS NOT BEEN RECOGNIZED PREVIOUSLY.

The Respondent challenged the composition of the traverse jury prior to trial. One particular challenge asserted concerned the lack of young adults from the ages of eighteen to thirty years of age in the jury venire. Respondent had claimed that young adults were a cognizable group.

The Supreme Court of Georgia has consistently held that young adults do not constitute a cognizable class. *Willis v. State, supra; Barrow v. State,* 239 Ga. 162, 164, 236 S.E.2d 257 (1977). Other circuits have affirmatively held that persons of a particular age group are not identifiable community groups for purposes of jury selection. *United States v. Ross,* 468 F.2d 1213 (9th Cir. 1972). The Magistrate specifically concluded that young adults, poor people and school teachers were not distinctive groups within the purview of *Duren v. Missouri,* 439 U.S. 357 (1979).

The Eleventh Circuit Court of Appeals, at the prompting of the Respondent, engaged in sheer speculation, in concluding that there was some remote possibility that young adults at this particular time in this particular county might possibly constitute a cognizable class by virtue of being South Georgians reared and educated in a desegregated society. *Willis v. Zant,* 720 F.2d at 1217.

This Court has established that in order to make out a prima facie case, a defendant must show more than the mere exclusion of a distinct group. It must be shown that the group alleged to have been excluded was a distinctive group in the community, that the representation of this group in the jury venire was not fair and reasonable in relation to the number of such persons in the community, and that the underrepresentation was due to the state's systematic exclusion of the group from the venire. *Duren*, 439 U.S. at 364. Petitioner asserts that to attempt to make a particular small segment of society in one particular county a distinct group unduly extends this Court's holding in *Duren v. Missouri*. Petitioner submits that even granting an evidentiary hearing on this issue is out of line with the prior holdings of this Court and other courts and is an undue extension of the holdings of this Court.

Petitioner would, therefore, urge this Court to grant certiorari to consider whether young adults in a particular county during a particular period in history could ever constitute a cognizable class so as to justify an evidentiary hearing on this situation and whether the Eleventh Circuit Court of Appeals' apparent recognition that this group might constitute a cognizable class is an undue extension of this Court's prior holding in *Duren v. Missouri*. Petitioner would further urge this Court to grant certiorari in light of the obvious conflict between the holding of the Eleventh Circuit Court of Appeals and the holdings of the Supreme Court of Georgia and the holdings of other circuits. *See United States v. Ross, supra; see also Hamlin v. United States*, 418 U.S. 87, 137 n. 21 (1974).

CONCLUSION

For all of the above and foregoing reasons, Petitioner requests that this Court grant a writ of certiorari to review the decision by the Eleventh Circuit Court of Appeals.

Respectfully submitted,

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for the Petitioner

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

MARION O. GORDON
First Assistant Attorney General

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, counsel of record for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served three copies of the foregoing petition for writ of certiorari upon the Respondent by depositing same in the United States mail with sufficient first class postage affixed thereto, addressed to:

Joseph M. Nursey
Millard C. Farmer
Post Office Box 1978
Atlanta, Georgia 30301

This 19 day of March, 1984.

/s/
MARY BETH WESTMORELAND
Assistant Attorney General

Counsel of Record for the Petitioner

Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

HENRY WILLIS, III, *Petitioner*, v. WALTER D. ZANT, Warden, *Respondent.*	Civil Action No. 81-615-MAC Magistrate No. 82-0054-M

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petitioner in this 28 U.S.C. §2254 action is presently under a sentence of death imposed by the Superior Court of Bleckley County, Georgia, following his conviction by jury in that court on January 28, 1978, of murder. Petitioner appealed directly to the Supreme Court of Georgia, which affirmed his conviction and sentence in *Willis v. State*, 243 Ga. 185 (1979), *cert. denied* 440 U.S. 885 (1979). Petitioner then sought habeas corpus relief in the Superior Court of Tatnall County, Georgia, on January 10, 1980, and following an evidentiary hearing, the court found petitioner's allegations to be without merit on August 29, 1980; the Supreme Court of Georgia agreed and denied petitioner's application for a certificate of probable cause to appeal on November 13, 1980. Following the denial of certiorari by the Supreme Court of the United States on April 20, 1981, petitioner sought federal habeas corpus relief in this court with the filing of his petition on July 24, 1981.

Petitioner asserts the following enumerations of error, to-wit:

(1) The prosecution used its peremptory strikes to exclude black veniremen from petitioner's jury;

(2) The use of the (b)(7) aggravating circumstance rendered petitioner's sentence unconstitutional;

(3) He was denied the effective assistance of counsel at the pre-trial, trial, and direct appellate level of his case;

(4) The trial court erred in denying his motion for change of venue;

(5) The trial court erred in refusing to allow three witnesses to testify on behalf of petitioner on the issue of mitigation;

(6) The assistant prosecutor was an employee of the Prosecuting Attorneys' Council of Georgia;

(7) The trial judge was appointed improperly and erred in failing to disqualify himself;

(8) Petitioner was denied funds to employ expert witnesses;

(9) Petitioner's jury was prosecution prone due to an improper exclusion of veniremen with scruples against capital punishment;

(10) The prosecuting attorney's conduct was improper;

(11) The trial court erred in failing to sequester the jury;

(12) The trial court charged the jury improperly on the issues of statutory, aggravating circumstances and mitigating circumstances;

(13) The trial court erred in not responding to the jury's question concerning life imprisonment;

(14) The grand and traverse juries in petitioner's case were unconstitutionally composed;

(15) The trial court erred in excusing prospective jurors due to age, employment, health and "other reasons";

(16) The death penalty is unconstitutional;

(17) The appellate review of petitioner's case was inadequate;

(18) The trial court erred in admitting into evidence statements made involuntarily by petitioner to law enforcement officers.

Several of petitioner's enumerations of error are raised for the first time in this court. Exhaustion of all available state remedies is normally required before seeking federal habeas relief, but is not an absolute requirement. *See Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978). This applies particularly if exhaustion would be futile. *Blackledge v. Perry*, 417 U.S. 21 (1974). Because dismissal for lack of exhaustion would not allow petitioner to have his claim reviewed by state courts at this time due to Ga. Code Ann. §50-127 (10), and considering the constitutionally inconsequential effect of the alleged errors, this court finds that petitioner has fully exhausted his state remedies.

The record reveals that petitioner was afforded a full and fair hearing on all issues raised in the state habeas corpus proceeding and, accordingly, the findings of fact concluded therein shall be presumed correct. 28 U.S.C. §2254(d). Moreover, as the state fact finding procedures were adequate in this case, and all pertinent factual issues having been fully and fairly developed, no evidentiary hearing is required to be held by this court. *Flores v. Estelle*, 578 F.2d 80 (5th Cir. 1978).

USE OF PEREMPTORY STRIKES

Petitioner contends that the prosecution used its ten peremptory strikes to eliminate all blacks from petitioner's jury. It has often been held that it is presumed that a prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. *Swain v. Alabama*, 380 U.S. 202, 222 (1965); *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971). Furthermore, "the subjective thought process of the prosecutor in deciding which prospective jurors to strike in a given case is beyond inquiry of the Court, trial or appellate, and cannot be questioned by opposing counsel." *United States v. Carlton*, 456 F.2d 207, 208 (5th Cir. 1972). Petitioner has not and could not show that these ten jurors were not peremptorily challenged by the state on grounds other than race. Indeed, a review of the voir dire examination reveals sound tactical reasons for the use of each peremptory strike. Therefore, this contention of petitioner is without merit.

USE OF THE (b) (7) AGGRAVATING CIRCUMSTANCE

In petitioner's case, the jury's verdict for the death sentence was predicated on Ga. Code Ann. §27-2534.1(b)(7), finding beyond a reasonable doubt that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. §27-2534.1(b)(8), finding beyond a reasonable doubt that the murder was committed against a peace officer engaged in the performance of his official duties, and Ga. Code Ann. §27-2534.1(b)(10), finding beyond a reasonable doubt that the murder was committed for the purpose of avoid-

ing, interfering with, or preventing a lawful arrest of himself or another. This court does not have to judge the validity of the Georgia Supreme Court's review of (b)(7). Two constitutional, aggravating circumstances were supported by legally sufficient evidence. Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not taint the proceeding so as to invalidate the other aggravating circumstance found in the sentence of death based thereon. *Stevens v. State*, 247 Ga. 698, 709 (1981); *Burger v. State*, 245 Ga. 458, 462 (1980). This result is buttressed by the United States Supreme Court's denial of certiorari in *Drake v. Zant* and *Westbrook v. Balkcom*, 449 U.S. 999 (1980) (J. Stevens concurring). Thus, two unquestionably constitutional aggravating circumstances having been found by petitioner's jury, his contention is without merit.

ASSISTANCE OF COUNSEL

Petitioner's only claim of any substance dealing with ineffectiveness of assistance of counsel concerns an alleged conflict of interest arising out of petitioner's counsel's representation of a co-participant in the murder who was subsequently tried by the state in a separate proceeding. Petitioner waited until his state habeas corpus proceeding to protest of harm from this alleged conflict of interest. Having raised no objection to the dual representation at trial, petitioner must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to establish a constitutional violation. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). It is noteworthy that petitioner's counsel, who represented him at trial and still represents him on this collateral appeal, refused to acknowledge the conflict of interest at the time he testified before the state habeas corpus court. This court does per-

ceive a potential conflict of interest that existed at the time of petitioner's trial, which developed into an actual conflict of interest at the subsequent trial of petitioner's co-participant. See *Fleming v. State*, 246 Ga. 90 (1980). However, this court perceives neither an actual conflict of interest nor, in the event one did exist, any adverse impact it had on the performance of petitioner's attorney in this case.

Petitioner's further protestations about ineffective assistance of counsel concern the conduct of persons and groups outside his legal defense team and do not in fact present a question of effectiveness of assistance of counsel. The record reveals that petitioner fired his court appointed counsel and had "no choice but to solicit and accept the assistance of Mr. Farmer," the main figure in the team of lawyers defending petitioner. The gist of petitioner's arguments is that the "cumulative effects of community, prosecutorial and judicial hostility toward petitioner's counsel virtually nullified counsel's ability to render effective assistance of counsel." Thus, petitioner is not complaining of malfeasance or nonfeasance on the part of his attorney, but prejudicial conduct of others. This alleged prejudicial conduct of others is set forth in the remaining contentions of petitioner and will be addressed appropriately by the court.

Petitioner's claim of ineffective assistance of counsel requires the court to inquire into the actual performance rendered by counsel based on the totality of the circumstances. *Lovett v. Florida*, 627 F.2d 706 (5th Cir. 1980). The actual performance rendered by petitioner's counsel passes constitutional scrutiny.

VENUE

After having successfully changed venue from Lanier County to Bleckley County, petitioner moved unsuccessfully to change venue from Bleckley County. Although his attorney candidly admitted to the trial court that he had not given it a "hell of a lot of stuff" to support the change of venue motion, petitioner now asserts pre-trial publicity and community hostility as sufficient grounds. The record reveals that there was a voir dire of the jury concerning its exposure to publicity, but it does not reflect, nor does petitioner present any evidence of, fixed opinions on the part of the jury as to his guilt or innocence. It is sufficient that a juror can lay aside his opinion and render a verdict based on the evidence presented at trial. *Dobbert v. Florida*, 432 U.S. 282, 302 (1977).

Changes of venue in criminal cases in Georgia are governed by Ga. Code Ann. §27-1201, which warrants a change when either an impartial jury cannot be obtained or there is a probability of danger or violence. Neither threshold requirement was met in this case and the trial court did not abuse its discretion by refusing to grant petitioner's motion for change of venue from Bleckley County.

INADMISSIBLE TESTIMONY

Petitioner contends the trial court erred in refusing to allow witnesses Pierce, Otto, and Bedeau to testify during the penalty phase of his trial to present evidence in mitigation of his sentence. It is fundamental that federal courts possess only limited authority to consider state evidentiary rulings in a habeas proceeding by a state prisoner. *Burgett v. Texas*, 389 U.S. 109 (1967); *Nordskog v. Wainwright*, 546 F.2d 69, 72 (5th Cir. 1977). Even a violation of evidentiary rules by a state trial court does not in itself

invoke federal relief, as only denials of fundamental fairness require the granting of habeas relief. *Cronnon v. Alabama*, 587 F.2d 246 (5th Cir. 1979). In this case, the court perceives neither error nor a denial of fundamental fairness. The excluded testimony from these three witnesses had no bearing whatsoever on petitioner's character, prior record, or the specific murder with which he was charged, and, accordingly, was clearly inadmissible. *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12 (1978).

ASSISTANT PROSECUTOR

Petitioner contends he was denied a fair trial because the assistant prosecutor was employed by the Prosecuting Attorney's Council of Georgia. Such a claim is merely speculative of possible prejudice, void of evidence of harm, and presents no basis for relief. *See Chapman v. California*, 386 U.S. 18 (1967); *Haggard v. Alabama*, 550 F.2d 1019 (5th Cir. 1977).

TRIAL JUDGE

Petitioner contends the trial judge was appointed improperly, erred in failing to disqualify himself, and denied petitioner a fair trial. Petitioner's allegations are speculative, conclusory, and not supported by the record in this case. Accordingly, they will not be considered by this court. *See Haggard*, 550 F.2d at 1021; *Woodard v. Beto*, 447 F.2d 103, 104 (5th Cir. 1971).

DENIAL OF MOTION FOR FUNDS TO EMPLOY EXPERT WITNESSES

Petitioner contends that the trial court erred in denying his motion, as an indigent, for funds to employ expert witnesses and investigators. Georgia law mirrors federal law in that the granting of a motion for the appointment

of expert witnesses lies within the discretion of the trial court. *See United States v. Moss*, 544 F.2d 954, 961 (8th Cir. 1976), *cert. denied* 429 U.S. 1077 (1977); *Welch v. State*, 237 Ga. 665, 672 (1976). Considering that the state allowed petitioner extensive pretrial discovery and the fact that the expert witnesses testifying on behalf of the state were subject to a thorough cross-examination by petitioner's counsel, this court concludes that the trial court did not err or abuse its discretion in denying petitioner's motion for funds to employ expert witnesses and investigators.

REMOVAL OF VENIREMEN

Petitioner seeks relief on the ground that anti-death penalty jurors were excluded in the selection process which resulted in a prosecution-prone jury. When a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," he can be struck for cause. *Witherspoon v. Illinois*, 391 U.S. 510, at 522 n.21 (1968). Thus, this allegation of petitioner is without merit.

PROSECUTORIAL MISCONDUCT

Specifically, petitioner claims the prosecution made improper remarks to prospective jurors concerning types of evidence admissible during the penalty phase, physically assaulted petitioner's counsel, burned a law book, cross-examined improperly, and used the victim's widow as a witness.

Improper comments to the jury and misconduct by the prosecution do not present a claim of constitutional magnitude which is cognizable in proceedings under 28 U.S.C

§2254 unless such statements and conduct, taken as a whole and in the context of the entire trial, were so prejudicial as to render the state court trial fundamentally unfair within the meaning of the due process clause of the fourteenth amendment. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980); *Alvarez v. Estelle*, 531 F.2d 1319 (5th Cir. 1976). A distinction must be made between conduct of a prosecutor which is improper or unwarranted, but is not a denial of due process. *See Easter*, 609 F.2d at 760.

Having reviewed the challenged segments of the prosecutor's comments and conduct in this case, this court concludes that they clearly were not so prejudicial as to deny petitioner a fair trial.

JURY SEQUESTRATION

Petitioner contends the trial court erred in refusing to sequester the jury prior to its selection to hear the case in violation of Ga. Code Ann. §59-718.1. That statute provides:

> "At any time during the trial of a civil or criminal case, either before or during jury deliberation, the judge may, in his discretion, allow the jury to be separated and the members thereof disbursed under appropriate instructions, except in capital cases."

The Georgia Supreme Court has interpreted this statute to require jurors to be sequestered in capital cases after their selection to hear the case and not before. *Willis v. State*, 243 Ga. 185, 188 (1979). This court agrees and finds that the trial court did not err in permitting prospective jurors to disburse under proper instructions before being selected and impanelled to hear the case.

JURY INSTRUCTIONS

Petitioner contends that the trial court failed to define adequately statutory aggravating circumstances, or to explain mitigating circumstances and the weighing of aggravating and mitigating circumstances to the jury. These challenges of petitioner are voiced for the first time in this court. Thus, there having been no similar objections to the trial court's instructions, the charges now under scrutiny must be so egregious as to render petitioner's trial fundamentally unfair. *Bryan v. Wainwright*, 588 F.2d 1108, 1110 (5th Cir. 1979).

In *Chenault v. Stynchcombe*, 581 F.2d 444, 448 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit held that a state court must "clearly instruct the jury about mitigating circumstances and the option to recommend against death." The trial court's charge taken in its entirety makes it clear that the jury could consider all the facts and circumstances of the case, including evidence in extenuation and mitigation. This court does not accept petitioner's argument that the court must specifically give examples of mitigating circumstances. The court's instructions to the jury meet present constitutional requirements and certainly did not render petitioner's trial fundamentally unfair.

JURY'S QUESTION

Petitioner alleges that the trial court erred in failing to respond to the jury's question concerning the length of a life sentence. In actuality, the jury questioned whether petitioner would have to serve the full term of his twenty-year sentence for armed robbery before serving any sentence imposed in the instant case and when petitioner would be eligible for parole if given a life sentence. Over

the state's objection and at the suggestion of petitioner, the trial court instructed the jury that it would follow the jury's recommendation that a life sentence imposed by the jury would run concurrently or consecutively to petitioner's other sentences. The trial court refused, however, to give petitioner's requested charge that a life sentence meant imprisonment for the remainder of his life. Such a request to charge by petitioner was contrary to the law of Georgia and the trial court's refusal to so instruct the jury was not error.

JURY COMPOSITION

Petitioner seeks relief on the grounds that the grand jury which indicted him and the petit jury which convicted him were discriminatorily composed. The first two indictments against petitioner in Lanier County were quashed due to unrepresentation of women on the grand jury. Petitioner was indicted a third time by a recomposed Lanier County grand jury and petitioner failed to object to the recomposed grand jury before or during his trial. Georgia has a valid rule of criminal procedure which requires a defendant to object to a grand jury during trial, failing which the objection is waived. Ga. Code Ann. §50-127(1). Federal courts must impose this waiver upon petitioner even though he may have had at the time of his trial a completely meritorious grand jury claim. *Francis v. Henderson*, 425 U.S. 536 (1976); *Cunningham v. Estelle*, 536 F.2d 82 (5th Cir. 1976). Petitioner may be relieved from the operation of this waiver, however, by showing cause for failing to make a timely objection *and* actual prejudice. *Lumpkin v. Ricketts*, 551 F.2d 680 (5th Cir. 1977). Petitioner has failed to make either showing. Accordingly, the court finds that petitioner has waived his right to challenge his grand jury in this habeas

corpus proceeding and has failed to show cause for his now being allowed to pursue his objection to the composition of the grand jury.

Petitioner made a timely objection, however, to the Bleckley County traverse jury which convicted him. In *Duren v. Missouri*, 439 U.S. 357 (1979), the Supreme Court clearly set out the elements of a *prima facie* violation of the fair cross-section requirement. The defendant must show (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process. This court disagrees with petitioner and does not consider young adults, poor people, and school teachers to be distinctive groups within the purview of *Duren*.

With regard to women and blacks, of the population of Bleckley County eligible for jury duty, 51.9% were women and 17.7% were black. Of the prospective jurors on the Bleckley County jury list at the time of petitioner's trial, 48.6% were women and 19.7% were black. These statistics do not satisfy the second element required by *Duren* and do not make out a constitutional violation. *See United States v. Maskeny*, 609 F.2d 183 (5th Cir. 1980).

EXCLUSION OF PROSPECTIVE JURORS

Petitioner makes the bare allegation that he was denied a jury composed of a representative cross-section of the community because the trial court excused prospective jurors due to their age, employment, health and

"other reasons". Petitioner fails to cite one example in support of this allegation. The allegation is speculative, conclusory, and unsupported by the record, and will not be considered by this court. See *Haggard*, 550 F.2d at 1021; *Woodard*, 447 F.2d at 104.

APPLICATION OF THE DEATH PENALTY

Petitioner claims unconstitutionality because the death penalty in his case was applied arbitrarily and discriminatorily on the grounds of race, sex and poverty, lacks theoretical justification, and constitutes cruel and unusual punishment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court of the United States upheld the Georgia capital punishment statutes "on their face." Subsequently, in reviewing the Florida death penalty statutes and in interpreting the line of cases from the Supreme Court of the United States plowing new ground in the area of capital punishment, the United States Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), determined that capital punishment is not unconstitutional per se and that if it chooses to do so, a state can punish murderers by imposing the death penalty as long as it does so through a statute with appropriate standards to guide discretion. Thus, petitioner's allegation that Georgia's capital statutes were applied in an arbitrary and discriminatory manner in his case are without merit. Obviously, as set forth in footnotes 28 and 40 of *Spinkellink*, federal habeas corpus review and an evidentiary hearing are warranted when the petitioner shows some specific act or acts of discrimination against him or that the facts and circumstances of his case are so clearly undeserving of capital

punishment that to impose it would be patently unjust and would shock the conscience. Neither showing has been made by this petitioner.

Ga. Code Ann. §27-2512 sets electrocution as the means of executing the death sentence in Georgia, which means petitioner challenges as being cruel and unusual punishment. This issue was decided in a manner adverse to him in *Spinkellink*. Thus, this claim also is without merit.

APPELLATE REVIEW

The Supreme Court of Georgia has a statutory duty pursuant to Ga. Code Ann. §27-2537(c)(3) to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. Petitioner contends that this duty was not performed in his case. This court disagrees. Georgia's appellate review procedures for death sentences are constitutional. *Gregg*, 428 U.S. at 207. This court will not engage in a case by case examination in comparison. *Spinkellink*, 578 F.2d at 606.

DENIAL OF FUNDS FOR STATE HABEAS PROCEEDING

Petitioner makes the bald assertion that the state habeas corpus court denied funds to pay the cost of subpoenas, mileage for witnesses, expert witnesses, investigators, and such other costs as were necessary to afford him a full and fair hearing. Petitioner has made no attempts to specify what witnesses could have been available to testify but for the lack of funds and how their testimony would have been relevant and crucial to the proceeding. Absent such required specificity, the allegation is reduced to speculation and unsupported conclu-

sions. Thus, it will not be considered by this court. *See Haggard*, 550 F.2d at 1021; *Woodard*, 447 F.2d at 104.

STATEMENTS OF PETITIONER

Petitioner contends that statements introduced at trial made by him to law enforcement officers following his arrest were coerced and involuntarily obtained. Pursuant to the mandate of *Jackson v. Denno*, 378 U.S. 368 (1974), the trial court conducted an evidentiary hearing prior to admitting the statements of petitioner into evidence. After hearing testimony the trial court concluded that it was freely and voluntarily given and that petitioner had previously been advised in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). This finding of fact by the trial court will be accorded the presumption of correctness required by 28 U.S.C. §2254(d). Section 2254(d) applies to factual determinations made either by a state trial or appellate court after a hearing on the merits of a factual issue. *Sumner v. Mata*, 449 U.S. 539 (1981); *Thompson v. Linn*, 583 F.2d 739 (5th Cir. 1978). The trial court's factual determination of the voluntariness of petitioner's statements following a full-fledged hearing on the merits on that issue will not be disturbed by this court.

For all of the above stated reasons, this petition for habeas corpus relief is hereby DENIED in its entirety.

SO ORDERED this 29th day of April, 1982.

/s/ JOHN D. CAREY
JOHN D. CAREY
United States Magistrate

APPENDIX B

IN THE MIDDLE DISTRICT OF GEORGIA
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

HENRY WILLIS, III, *Petitioner,* VS. WALTER B. ZANT, Warden, *Respondent.*	CIVIL ACTION NO. 81-165-MAC

JUDGMENT

Pursuant to the order of this court which was dated and filed, September 21, 1982, and for the reasons stated therein, petitioner's application for a writ of habeas corpus is denied.

This 21st day of September, 1982.

GIRARD W. HAWKINS, Clerk

/s/ By: Elaine W. Jones
Elaine W. Jones
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

HENRY WILLIS, III, *Petitioner,* vs. WALTER B. ZANT, Warden, *Respondent.*	CIVIL ACTION NO. 81-165-MAC

ORDER

Henry Willis, III, a state prisoner convicted of the murder of the Chief of Police of Ray City, Georgia and sentended to die, petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleges that his conviction and/or sentence should be set aside on constitutional grounds. His petition was submitted to a United States magistrate pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) for the submission of proposed findings of fact and recommendations for disposition by a judge of this court. Those have been submitted and petitioner, as the law allows, has filed his objections thereto. In the exercise of his responsibility, the undersigned trial judge has reviewed and made a *de novo* determination of the portions objected to by the petitioner and by this order does hereby accept said proposed findings and recommendations in their entirety.

Petitioner's application for a writ of habeas corpus is therefore DENIED.

SO ORDERED, this 21st day of September, 1982.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-8677

HENRY WILLIS, III,
Plaintiff-Appellant,

versus

WALTER B. ZANT, Warden, Georgia Diagnostic and Classification Center,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

(November 17, 1983)

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

The petitioner, Henry Willis III, was convicted in the Superior Court of Bleckley County, Georgia, of malice murder. He was sentenced to death. The Georgia Supreme Court affirmed his conviction and sentence. *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70 (1979). He then petitioned the Superior Court of Tatnall County, Georgia, for a writ of habeas corpus. The court denied his petition,

and the Georgia Supreme Court declined to entertain an appeal therefrom. The United States Supreme Court has denied petitions for writs of certiorari to review both decisions of the Georgia Supreme Court. *Willis v. Georgia*, 444 U.S. 885, 100 S.Ct. 178 (1979); *Willis v. Balkcom*, 451 U.S. 926, 101 S.Ct. 2003, *reh'g denied*, 452 U.S. 932, 101 S.Ct. 3070 (1981). Willis then petitioned the district court for a writ of habeas corpus, alleging thirty-three constitutional infirmities in his conviction and sentence. The district court denied his petition without an evidentiary hearing. Petitioner presents eight of these claims to us on appeal.[1] We hold that four of these claims are without merit. Two of the remaining claims require an evidentiary hearing, and that hearing must be held before we dispose of the final claims.

I.

Petitioner, Son Fleming, and Larry Fleming were indicted in Lanier County, Georgia, for the murder of James Giddens, Police Chief of Ray City, Georgia, on the evening of February 11, 1976. They allegedly abducted Chief Giddens following an armed robbery, shot him several times with a .357 magnum and a .22 caliber pistol, and left him to die in a South Georgia swamp.

Petitioner obtained the disqualification of the Superior Court judge who was assigned to try his case and, in succession, four other judges as well. His motion to disqualify the prosecutor was denied.[2] Petitioner's case finally went to trial on January 23, 1978. (The trials of his two co-indictees were held later, in other counties.) Petitioner, who is black and was twenty-three years old at the time of his trial, challenged the composition of the jury venire, or pool, prior to commencement of voir dire, on the ground that it did not represent a fair cross sec-

tion of the community as required by the sixth and fourteenth amendments to the Constitution. The court rejected his challenge. Next, petitioner moved in limine for an order precluding the prosecutor from peremptorily challenging any black veniremen who were qualified to serve on the traverse, or petit, jury. The court denied this motion also. Jury selection proceeded, and an all-white jury was empaneled, the prosecutor having utilized, over petitioner's objection, his ten peremptory challenges to strike all ten of the qualified black veniremen. The trial ensued. The jury found petitioner guilty of malice murder, and after considering the evidence relevant to the sentence to be imposed—death or life imprisonment—recommended the death sentence. The trial judge, being bound under Georgia law by the jury's recommendation, imposed that sentence.

Petitioner presents eight discrete federal constitutional claims in this appeal: (1) he was denied an opportunity to present evidence at his state and federal habeas corpus proceedings, in violation of the due process clause of the fourteenth amendment, because the State of Georgia failed to provide him financial assistance to obtain the evidence necessary to prove his constitutional claims and failed to transcribe, for his use, several thousand pages of pretrial proceedings; (2) his trial counsel possessed a conflict of interest, in that counsel represented both petitioner and co-indictee Larry Fleming at their separate trials, thereby denying petitioner effective assistance of counsel in violation of his sixth, and fourteenth, amendment right; (3) his confession was involuntary, and its admission into evidence against him violated due process; (4) prosecutorial misconduct rendered the guilt phase of petitioner's trial fundamentally unfair and denied petitioner due process;[3] (5) a "cognizable group"—young

adults from age 18-30 – was systematically excluded from petitioner's jury venire, thereby denying his sixth, and fourteenth, amendment right to a venire made of a fair cross-section of the community; (6) the prosecutor had a history of intentionally and systematically excluding blacks from traverse juries through the use of peremptory challenges, in violation of the equal protection clause of the fourteenth amendment;[4] (7) the trial court's jury charge concerning aggravating circumstances was constitutionally defective, under the eighth, and fourteenth, amendments; and (8) prosecutorial misconduct rendered the sentencing phase of petitioner's trial fundamentally unfair and thus denied petitioner due process.

The first six of these claims pertain only to the guilt phase of petitioner's trial; the last two relate solely to the sentencing phase. We presently entertain only the claims arising out of the guilt phase, affirming summarily the district court's rejection of the first four.[5] We vacate the district court's order as to the fifth and sixth claims and remand those two claims for an evidentiary hearing. We retain jurisdiction of the case, noting that a decision on petitioner's final two claims, which stem from the sentencing phase of his trial, will be unnecessary if petitioner eventually prevails on either of the two claims remanded. We turn now to the fifth and sixth claims stated above.

II.

A.

Willis alleges that young adults, aged 18-30, were unconstitutionally underrepresented in the jury venire that was summoned for his trial in Bleckley County. Willis claims that young adults are a "cognizable group" and that this group's underrepresentation violated his sixth amendment right, as made applicable to the states through the fourteenth amendment, to a jury venire that repre-

sents a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975); *see also Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664 (1979); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983); *United States v. De Alba-Conrado*, 481 F.2d 1266, 1270, 1271 (5th Cir. 1973); Daughtery, *Cross Sectionalism in Jury-Selection Procedures after* Taylor v. Louisiana, 43 Tenn. L. Rev. 1 (1975).

The state trial judge heard this challenge to the jury venire prior to the commencement of traverse jury selection. The prosecutor stipulated that young adults, aged 18-30, constituted only 10.1% of the venire even though they constituted 35.1% of the eligible jury population in Bleckley County. The judge, citing Georgia Supreme Court 'cases,' held as a matter of law that young people did not constitute a constitutionally cognizable group, said he would not consider any evidence Willis proffered on the point, and denied Willis' motion to strike the entire venire. The Georgia Supreme Court, in affirming Willis' conviction, held that the trial judge had handled this issue correctly. The magistrate to whom the district court referred Willis' petition for habeas corpus relief held likewise. In his recommendation to the district court, the magistrate concluded that young adults do not constitute a "cognizable group" under the sixth amendment's fair cross-section standard. He did permit Willis to submit surveys and a lengthy article on the issue, but did not receive them until after he had made his recommendation, to which Willis objected, to the district court. The district court, in its one paragraph review and adoption of the magistrate's recommendation, gave no indication that it accorded these submissions any consideration. Petitioner states, quite correctly, that he has yet to receive an evidentiary hearing on this claim. The three courts

that have passed on it have summarily concluded that people aged 18-30 cannot constitute a cognizable group under the sixth amendment.

Whether or not a class of persons is a sufficiently distinct and cognizable for sixth amendment fair cross-section analysis is a question of fact. *Hernandez v. Texas*, 347 U.S. 475, 478, 74 S.Ct. 667, 670 (1954) ("whether such a group exists within the community is a question of fact"). *See also, United States v. De Alba-Conrado*, 481 F.2d 1266, 1270, 1271 (5th Cir. 1973) (remanding case for determination of cognizable group). The distinctiveness and homogeneity of a group under the sixth amendment depends upon the time and location of the trial. For example, Latins have been held to be a cognizable group in Miami, Florida.[7] In another community, they might not be. To show that a group is distinct or cognizable under the sixth amendment, a defendant must show: (1) that the group is defined and limited by some factor (i.e., that the group has a definite composition such as by race or sex); (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. *United States v. Gruberg*, 493 F. Supp. 234 (S.D. N.Y. 1979); *see also United States v. Test*, 550 F.2d 577, 584 (10th Cir. 1976); *United States v. Guzman*, 337 F. Supp. 140, 143-44 (S.D. N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937, 93 S.Ct. 1397 (1973).

Petitioner claims that young adults constituted a distinct group, within the above test, in Bleckley County, Georgia, at the time of his trial. He states that this group

contained the only South Georgians who were reared and educated in a desegregated society. Thus, the white members of this group could more easily understand and relate to petitioner, a twenty-three year old black man, than could older whites. We do not comment on the merits of petitioner's contention;[8] rather, we vacate the denial of relief on this issue and remand it to the district court for an evidentiary hearing.[9] Petitioner is entitled to a chance to prove his claim; the court should, if necessary, allow discovery under 28 U.S.C.A. fol. § 2254 Rule 6 (1977).

To make out a prima facie case, petitioner must show more than mere exclusion of a distinct group. He must show: (1) that the group alleged to have been excluded was a distinctive group in the community, as defined, *supra;* (2) that the representation of this group on his jury venire was not fair and reasonable in relation to the number of such persons in the community;[10] and (3) that this underrepresentation was due to the State's systematic exclusion of the group from the venire. *Duren*, 439 U.S. at 364, 99 S.Ct. at 668.

In determining whether petitioner has established a prima facie case of exclusion, the district court must bear in mind that, as the Supreme Court has cautioned, states are free to prescribe relevant qualifications for jury service and reasonable exemptions therefrom. *Duren*, 439 U.S. at 367, 99 S.Ct. at 670; *Taylor*, 419 U.S. at 538, 95 S.Ct. at 701. If these qualifications and exemptions result in a disproportionate exclusion of a distinct group, however, the state must show that they manifestly and primarily advance a significant state interest. *Duren*, 439 U.S. at 367-68, 99 S.Ct. at 670.

Although the distinctiveness of a group for sixth amend-

ment purposes is a question of fact, we must add a caveat. Certainly, a court can determine as a matter of law that a group is not cognizable or distinct. For example, no evidentiary hearing would be needed to determine that redheads or vegetarians are not distinctive classes within sixth amendment fair cross-section analysis. We only hold that the group distinctiveness of young adults in South Georgia during the late 1970's does not lend itself to such an easy determination.

B.

Petitioner alleges that he was denied his sixth, eighth, and fourteenth amendment rights because he was a victim of the prosecutor's historical and systematic use of peremptory challenges to remove black persons from traverse juries. In empaneling the jury to try this case, the court summoned 449 veniremen. Three hundred twenty were excused for various reasons, none of which are germane to this appeal, and 129 (ninety-eight white and thirty-one black) were subjected to complete vor dire by the parties. Of these 129, the court excluded twenty because of their attitudes against the death penalty (three white and seventeen black), forty-eight for prejudice, and five for other reasons. None of these excusals is questioned here. This left fifty-six veniremen, all competent to serve as traverse jurors.

The prosecutor, Vickers Neugent, District Attorney of the Alapaha Circuit, possessed ten peremptory strikes; the defense had twenty. Operating under Georgia's "struck jury" system, (former) Ga. Code Ann. §§ 59-805, 808, the court presented one by one the fifty-six veniremen to the parties. The court presented each venireman to the prosecutor first; he accepted or peremptorily struck the

venireman. If the venireman was accepted, the court presented him to defense counsel, who would accept or strike. The traverse jury consisted of the first twelve venireman who were accepted by both sides. The selection of two alternate jurors was accomplished in the same manner, the prosecution having two peremptory challenges and the defense four.[11] Following this procedure, the traverse jury, not including the alternates, was selected from the first forty of the fifty-six competent veniremen.[12]

Of the forty potential jurors, thirty were white and ten were black. The prosecutor used all ten of his peremptories to strike all the blacks who were presented as regular jurors. Additionally, the one alternate peremptory challenge the prosecutor exercised was used to strike the one black presented as a potential alternate juror. Willis thus went to trial with an all-white jury, with white alternates.

Petitioner claims that the jury selection tactic the prosecutor employed in his case was merely the prosecutor's application of his historic, systematic practice of excluding blacks from traverse juries through the use of the peremptory challenge. Petitioner has been steadfast in his assertion of this complaint. He presented it initially to his trial judge before jury selection began, contending that the prosecutor would peremptorily strike blacks as part of a historic, systematic pattern and seeking an order admonishing the prosecutor not to follow the practice in Willis' case.[13] Willis sought leave to present a speaking proffer in support of his claim, but the trial judge denied his request, ruling that Willis had no claim regardless of what the facts might show as to the prosecutor's past practice and his subsequent conduct in striking the jury in Willis' case. Willis presented his claim to

the trial judge again, after the prosecutor had peremptorily challenged every black submitted by the Court and the jury was ready to be sworn. The trial judge, adhering to his earlier ruling, again rejected Willis' claim.

Willis presented his claim a third time, in the direct appeal of his conviction and sentence to the Georgia Supreme Court. That court stated that Willis had foreclosed his claim by not asking the trial court to overturn the Georgia statute authorizing peremptory challenges; the court held that "[s]o long as the statute is valid the District Attorney may use such challenges in his discretion." *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, 73, *cert. denied*, 444 U.S. 885, 100 S.Ct. 178 (1979). Finally, Willis presented his claim to the district court in his petition for habeas corpus relief. The district court, adopting the magistrate's recommendation, concluded that the claim was meritless. The court based its conclusion on a case from the former Fifth Circuit, *United States v. Carlton*, 456 F.2d 207, 208 (5th Cir. 1972) (per curiam), which held that a defendant may not inquire into the prosecutor's reasons for exercising a peremptory challenge. That proposition is true, but the court ignored the caveat we added in *Carlton*: "We hasten to add that where regular practice or custom involving the use of peremptory challenges results in an effective disenfranchisement of a particular class of persons from serving on petit juries . . . the Constitution may well dictate a different result." *Id.*, citing *Swain v. Alabama*, 380 U.S. 202, 224, 85 S.Ct. 824, 838 (1965). The very gist of petitioner's claim is that the prosecutor had historically and systematically employed his peremptory challenges to disenfranchise blacks, and did so in petitioner's case. This is squarely within the exception we noted in *Carlton*.

This appeal arises solely under the equal protection clause of the fourteenth amendment.[14] The Supreme Court was faced with a very similar claim in *Swain, supra.*[15] *Swain* teaches that a prosecutor's use of peremptory challenges to strike all the blacks on a traverse jury is not improper since the "presumption in any case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." 380 U.S. at 222, 85 S.Ct. at 837. *Carlton*, 456 F.2d at 208; *United States v. Pearson*, 448 F.2d 1207, 1216-18 (5th Cir. 1971); *United States v. Williams*, 446 F.2d 486, 488 (5th Cir. 1971). This presumption of propriety insulates from inquiry the removal of blacks from any individual traverse jury. Thus petitioner has no constitutional right to a traverse jury that includes a member of his race. *United States v. Calhoun*, 542 F.2d 1094, 1103 (1976), *cert. denied sub nom Stephenson v. United States*, 429 U.S. 1064, 97 S.Ct. 792 (1977); *see also United States v. Boykin*, 679 F.2d 1240, 1245 (8th Cir. 1982); *United States v. Gonzalez*, 456 F.2d 1067, 1068 (9th Cir. 1972); *Pearson*, 448 F.2d at 1213-15.

Petitioner, however, has alleged a *systematic* practice of exclusion. As the *Swain* Court stated, "this claim raises a different issue and it may well require a different answer. . . ." 380 U.S. at 223, 85 S.Ct. at 837. "[This practice] is invidious discrimination for which the peremptory system is an insufficient justification." *Id.* The Court went on to hold:

> [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the

> result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on an added significance. . . . In these circumstances . . . it would appear that the purpose of the peremptory challenge are [sic] being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecution may well be overcome.

Id. at 223-24, 85 S.Ct. at 837-38 (citations omitted). Petitioner has never been afforded an opportunity to present his case under this holding. He is entitled to one, and we vacate the district court's ruling on this issue and remand for an evidentiary hearing.

The Supreme Court has never stated the elements of a prima facie case under *Swain*. Winning *Swain* claims are exceedingly rare. We are unable to find any case from this circuit where the defendant has prevailed under *Swain*. In its recent decision on this issue,[16] the Eighth Circuit, en banc, stated that it could find only two winning *Swain* claims anywhere. *State v. Brown*, 371 So.2d 751 (La. 1979); *State v. Washington*, 375 So.2d 1162 (La. 1979). Commentators have criticized *Swain* severely because of the difficulty defendants have had in proving systematic exclusion through the use of peremptory challenges.[17]

We provide the following elucidation to aid the district court in its handling of this claim. At his evidentiary hearing, petitioner must prove on specific facts [18] that Vickers Neugent had a systematic *and intentional* practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated in petitioner's trial. The exclusion must have occurred "in case after case, whatever the circumstances, whatever the crime and who-

ever the defendant may be." *Swain*, 380 U.S. at 223, 85 S.Ct. at 837. Petitioner is not required to show that the prosecutor *always* struck *every* black venireman offered to him, *Pearson*, 448 F.2d at 1217, but the facts must manifestly show an intent on the part of the prosecutor to disenfranchise blacks from traverse juries in criminal trials in his circuit, "to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Swain*, 380 U.S. at 224, 83 S.Ct. at 838. The prosecutor's use of peremptory challenges in only a few trials is clearly insufficient to state a prima facie case,[11] as would be a pattern of exclusion which occurred for only a few weeks. In short, petitioner must marshal enough historical proof to overcome the presumption of propriety in which *Swain* clothes peremptory challenges, and thereby show Neugent's intent to discriminate invidiously.

If petitioner can prove his prima facie case, the veil insulating prosecutorial discretion will be rent. The prosecutor, however, may rebut petitioner's prima facie case in two ways. First, he may make "a showing that racially neutral selection procedures have produced the [historical and systematic] disparity." *United States v. Perez-Hernandez*, 672 F.2d 1380, 1387 (11th Cir. 1982), citing *Alexander v. Louisiana*, 405 U.S. 625, 631-32, 92 S.Ct. 1221, 1226 (1972). In equal protection cases such as this, however, mere "affirmations of good faith . . . are insufficient to dispel a prima facie case of systematic exclusion," *id.* at 632, 92 S.Ct. at 1226, and "a mere denial of discriminatory intent will not suffice." *Perez-Hernandez*, 672 F.2d at 1387, citing *Turner v. Fouche*, 396 U.S. 346, 361, 90 S.Ct. 532, 540 (1970). This is not to say that testimony alone is per se insufficient. We believe, however, that if petitioner can show a prima facie case, "testimony from

the alleged discriminators should be viewed with a great deal of judicial scrutiny." *Perez-Hernandez*, 672 F.2d at 1387.

A second way in which the prosecutor may rebut a prima facie case under *Swain* is not to show racially neutral reasons for the systematic disparity, but rather to show neutral reasons for the striking of all the blacks in petitioner's trial itself. The prosecutor may have had strategic reasons unrelated to race for striking the eleven blacks in Willis' case. If so, he may bring them to the district court's attention and—subject to the caveat above concerning testimony of alleged discriminators after a prima facie case is shown—the district court could credit this testimony as adequate rebuttal. We realize that this lays bare the prosecutor's thought processes and requires judicial inspection of the prosecutor's trial strategy concerning the selection of a single jury. *Swain* teaches, however, that the presumption of correctness and the insulation surrounding the prosecutor's discretion cannot survive the presentation of a prima facie case of systematic exclusion. 380 U.S. at 221-24, 85 S.Ct. at 836-38. If a prosecutor wishes not to disclose his methods of strategy, he can forego this avenue of rebuttal.

III.

We remand the case to the district court for an evidentiary hearing on the two claims we have discussed above, but retain jurisdiction of this appeal. We direct the district court to certify its findings and conclusions on these two claims to us within 120 days.

Accordingly, this case is

AFFIRMED in part, VACATED in part, and REMANDED.

[1] In his oral argument to this court, petitioner's attorney stated that petitioner has abandoned the other 25 claims which he brought before the district court but did not argue before this court on appeal.

[2] Petitioner also moved, unsuccessfully, to disqualify the special assistant prosecutor. The motions to disqualify the prosecutors are not in issue in this appeal.

[3] Petitioner alleged as one issue on appeal that prosecutorial misconduct rendered both the guilt and sentencing phases of his trial unfair. Georgia death penalty trials are divided into these two distinct and separate stages, however, and this circuit's handling of prosecutorial misconduct cases reflects this division. *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983). Accordingly, we read petitioner's claim as stating two separates issues on appeal.

[4] Petitioner also claimed that this systematic exclusion denied his rights under the sixth and eighth amendments as made applicable to the states by the fourteenth amendment. We reject these contentions *infra* note 14, and analyze this claim only under the equal protection clause of the fourteenth amendment.

[5] These four claims have no merit. Petitioner had full opportunity to put forth evidence, and the failure of the State to provide financial assistance for habeas proceedings states no constitutional issue. Petitioner has at no time shown a conflict of interest on the part of his attorney under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980), and *Baty v. Balcom*, 661 F.2d 391 (5th Cir. Unit B 1981). The record is replete with evidence that petitioner confessed voluntarily, *Milton v. Wainwright*, 306 F. Supp. 929 (S.D. Fla. 1969), *aff'd*, 428 F.2d 463 (5th Cir. 1970), *aff'd*, 402 U.S. 371, 92 S.Ct. 2174 (1972), and was given a fair and full hearing under *Jackson v. Denno*, 378 U.S. 368, 64 S.Ct. 1774 (1964). Our study of the trial transcript shows that prosecutorial misconduct did not render the guilt phase of petitioner's trial fundamentally unfair.

[6] *State v. Gould*, 232 Ga. 844, 209 S.E.2d 312 (1974); *White v. State*, 230 Ga. 327, 196 S.E.2d 849 (1973).

[7] *See United States v. Cabrera-Sarmiento*, 533 F. Supp. 799, 804 (S.D. Fla. 1982) (Circuit Judge Hatchett, sitting by designation).

[8] We do note that the Southern District of Florida has found that adults under the age of 30 in that district do not constitute a separate cognizable group within the meaning of the fifth amendment. *Id. But see LaRoche v. Perrin*, 34 Crim. L. Rept'r 2088 (1st Cir. Sept. 30, 1983) (unexplained "shortfall of youth" in jury venire states valid sixth amendment claim under *Duren*). *But see also Cuadadanos Unidos de San Juan v. Hidalgo*, 622 F.2d 807, 818 (5th Cir. 1980) *cert. denied*, 450 U.S. 964, 101 S.Ct. 1479 (1980).

[9] This case differs from *Cox v. Montgomery*, No. 83-8243, slip op. at 337 (11th Cir. Nov. 3, 1983). In that case we held that the trial court did not err by declining to provide funds to enable the defendant to hire a sociologist to prove that young adults are a cognizable group. The record in *Cox* makes clear that whether young adults were a cognizable group was not a material issue in the case. The trial court found that even if young adults were cognizable, there was no systematic exclusion.

[10] *See, e.g., Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221 (1972); *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643 (1967); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667 (1954); *Preston v. Manderville*, 428 F.2d 1392, 1393-94 (5th Cir. 1970).

[11] Georgia law granted the defense four challenges, but, as the case turned out, Willis actually had six peremptory challenges to alternates because he only used 18 of his 20 available challenges in seating the regular jury. The two unused challenges carried over. In all, he exercised five peremptory challenges to alternates and 18 to potential members of the regular panel.

[12] The two alternates were selected from a group of eight veniremen presented, one by one, to the State and then to Willis. In seating the alternates, the prosecutor exercised one peremptory challenge, against the only black, and Willis exercised five. *See supra* note 11.

[13] We do not address whether a defendant could ever properly seek an order limiting prosecutorial discretion in this matter *before* the prosecutor has exercised his peremptory challenges. It is clear, however, that a defendant may object to the panel after it has been selected, and that Willis did.

[14] On appeal, petitioner states that the prosecutor's historical use of peremptory challenges violated his sixth amendment right, which, according to petitioner, guaranteed a traverse jury representing a fair cross-section of the community. Although this sixth amendment claim is colorable, *see United States v. Childress*, No. 82-1261 slip op. (8th Cir. Sept. 2, 1983) (en banc); *People v. Payne*, 103 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982), *appeal docketed*, No. 56709 (Ill. 1983), we decline petitioner's invitation to extend the sixth amendment's cross-section analysis under *Taylor, supra*, to the traverse jury itself. *Taylor* remains limited to venires. The United States Court of Appeals for the Eighth Circuit recently considered the issue in depth and was unwilling to read the sixth amendment so broadly. *Childress*. Petitioner cites no countervailing authority of any weight. Petitioner also contends that the prosecutor's exclusion of blacks through peremptory challenges violated his eighth amendment right to be free from cruel or unusual punishment. This contention is meritless.

[15] In *Swain* the defendant attacked the underrepresentation of blacks on grand juries and petit jury venires, and the exclusion

through peremptory challenges of blacks from petit juries in Talladega County, Alabama. In the instant case, petitioner has alleged that the District Attorney of the Alapaha Judicial Circuit of Georgia systematically excluded blacks from traverse (petit) juries, including petitioner's. Although *Swain* did not involve a challenge to the practices of a single prosecutor, this claim falls squarely under *Swain* as interpreted by this circuit. *United States v. Pearson*, 448 F.2d 1207 (5th Cir. 1971), *accord Carlton*, *supra*, and other courts. *See, e.g.*, *United States v. Childress*, No. 82-1261 slip op. (8th Cir. Sept. 2, 1983) (en banc), citing *State v. Brown*, 371 So.2d 751 (La. 1979); *State v. Washington*, 375 So.2d 1162 (La. 1979).

[16] *United States v. Childress*, No. 82-1261 slip op. (8th Cir. Sept. 2, 1983) (en banc).

[17] *See, e.g.*, Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 New Eng. L. Rev. 192, 195-202 (1978); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Calif. L. Rev. 235, 302 (1968); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and A Constitutional Analysis*, 81 Mich. L. Rev. 1, 10-11 (1982); *The Supreme Court, 1964 Term*, 79 Harv. L. Rev. 56, 135-39 (1965); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. Cin. L. Rev. 554, 559-60 (1977); Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 Va. L. Rev. 1151, 1160-63 (1966); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L. J. 1715, 1723 & n. 36 (1977).

[18] This proof could be direct evidence, such as testimony, or indirect evidence such as statistical proof. Mere allegations are insufficient. *See, United States v. Ward*, 610 F.2d 294, 295 (5th Cir. 1980); *Pearson*, 448 F.2d at 1215-17.

[19] *Id.* at 1213-15 ("clearly such a claim cannot be established by proof of the Government's striking of Negroes in any one case").

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-8677

HENRY WILLIS, III,

Petitioner,

versus

WALTER B. ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent.

Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 17, 11 Cir., 1983, ____ F.2d ____).

(December 22, 1983)

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the mem-

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD TJOFLAT
United States Circuit Judge

REHG-6
(Rev. 6/82)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1558

WALTER D. ZANT, WARDEN
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Petitioner,

v.

HENRY WILLIS, III,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Joseph M. Nursey
Millard C. Farmer
P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

COUNSEL FOR HENRY WILLIS

QUESTIONS PRESENTED

(As Stated by Petitioner)

I.

Did the decision by the United States Court of Appeals for the Eleventh Circuit improperly amount to a conclusion that the Georgia statute concerning the use of peremptory challenges is unconstitutional and did the Eleventh Circuit Court of Appeals improperly conclude that the Respondent could inquire into the thought processes of the prosecutor in making such peremptory challenges?

II.

Did the decision by the Eleventh Circuit Court of Appeals allowing an evidentiary hearing as to the jury composition impermissibly establish a new category, that is, a particular age group, as an identifiable community group for purposes of jury selection?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

(A) Procedural History 1

(B) Statement of Facts 2

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED 4

I.

[As stated by Petitioner]

DID THE DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPROPERLY AMOUNT TO A CONCLUSION THAT THE GEORGIA STATUTE CONCERNING THE USE OF PEREMPTORY CHALLENGES IS UNCONSTITUTIONAL AND DID THE ELEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY CONCLUDE THAT THE RESPONDENT COULD INQUIRE INTO THE THOUGHT PROCESSES OF THE PROSECUTOR IN MAKING SUCH PEREMPTORY CHALLENGES? 4

II.

[As stated by Petitioner]

DID THE DECISION BY THE ELEVENTH CIRCUIT COURT OF APPEALS ALLOWING AN EVIDENTIARY HEARING AS TO THE JURY COMPOSITION IMPERMISSIBLY ESTABLISH A NEW CATEGORY, THAT IS, A PARTICULAR AGE GROUP, AS AN IDENTIFIABLE COMMUNITY GROUP FOR PURPOSES OF JURY SELECTION? 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES CITED

Alexander v. Louisiana, 405 U.S. 625 (1972) 14

Ciudadanos Unidos de San Juan v. Hidalgo Cty., 622 F.2d 807 (5th Cir. 1980), cert. denied, 450 U.S. 964 (1981) 16

Hernandez v. Texas, 347 U.S. 475 (1954) 14,16

Swain v. Alabama, 380 U.S. 202 (165) 7

Taylor v. Louisiana, 419 U.S. 522 (1975) 15

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) . . 15

Whitus v. Georgia, 389 U.S. 545 (1967) 14

Willis v. Balkcom, 68 L.Ed.2d 305 (1981) 2

Willis v. State, 243 Ga. 185, 253 S.E.2d 70, cert denied, 444 U.S. 885 (1979) 1

Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983) 2

STATE STATUTORY PROVISIONS

Ga. Code Ann. §59-801 [OCGA §15-12-160] 2,7

Ga. Code Ann. §59-805 [OCGA §15-12-165] 2,7

Ga. Code Ann. §59-808 [OCGA §15-12-166] 2,7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WALTER D. ZANT, WARDEN,	*	
Petitioner	*	
	*	No. 83-1558
v.	*	
HENRY WILLIS, III,	*	
Respondent		

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE [1]

(i) Procedural History

Henry Willis was convicted of murder and sentenced to death by the Superior Court of Bleckley County in Cochran, Georgia on January 28, 1978. The Supreme Court of Georgia affirmed the conviction and sentence. Willis v. State, 243 Ga. 185, 253 S.E. 2d 70, cert. denied, 444 U.S. 885 (1979).

On January 10, 1980, Henry Willis filed a Petition for Writ of Habeas Corpus in the Superior Court of Tattnall County, Georgia. The Petition was subsequently amended. The Petition was denied on August 29, 1980 (Ex. 40). A certificate of probable cause to appeal was denied by the Supreme Court of

1. References to the Record in the District Court below will be designated "R" followed by the appropriate page number. The transcript and record of the proceedings in the state courts of Georgia are contained in the forty-four Exhibits filed by the State with its Answer-Response in the District Court. The Exhibits are listed at R-62. References to the state court proceedings will be designated "Ex." followed by the appropriate Exhibit number and page number.

Georgia on November 13, 1980. Certiorari was denied by the United States Supreme Court. Willis v. Balkcom, 451 U.S. 926, rehearing denied, 452 U.S. 932 (1981).

On July 24, 1981, Henry Willis filed a Petition for Writ of Habeas Corpus in the District Court below (R-11); this Petition was subsequently amended (R-58). The case was referred to a United States Magistrate to submit proposed findings of fact and recommendations for disposition (R-5).

On April 29, 1982, the Magistrate issued his Proposed Findings of Fact and Conclusions of Law (R-177). (State's Appendix A). After objections were made by Henry Willis to the proposed findings and conclusions of the Magistrate, the District Court, on September 21, 1982, issued a one paragraph order adopting in full the Magistrate's proposed findings and conclusions and denying habeas corpus relief (R-298). (State's Appendix B).

Henry Willis appealed the denial of habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. On November 17, 1983, that Court entered its judgment directing the district court to conduct an evidentiary hearing on two separate issues. Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983). (State's Appendix C). On December 22, 1983, the Court of Appeals denied the State's suggestion for rehearing en banc. (State's Appendix D). The State has filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (No. 83-1558), and now Henry Willis files this brief in opposition.

(ii) Statement of Facts

Henry Willis, III, a young black man, was charged with the February 11, 1976 murder of a white police officer in a small south Georgia town. Henry Willis and another young man, Larry Fleming, had robbed a convenience store while Son Fleming,

the uncle of Larry Fleming and twenty-five years Henry Willis' senior, waited outside in a car he had borrowed for this purpose. In flight from the robbery, the three men were stopped by a police officer, whom they overpowered, taking his .357 Magnum. They ordered him into their car and drove him several miles, before Son Fleming, the older participant, ordered him out of the car and shot him in the head with the .357 Magnum. After this shooting, Henry Willis and Larry Fleming fired several shots of .22 caliber ratshot into the victim.

The central issue for the jury to decide was the punishment to be meted out to Henry Willis.

Venue in the case was originally in Lanier County, Georgia; however, a change of venue was ordered by the trial judge. The trial judge ordered counsel for the prosecution and counsel for the defense to each submit a list of ten (10) counties to consider for the venue change. None of the ten counties on the prosecution and defense lists coincided. All of the counties listed by the prosecution had a low percentage of black population.The trial judge ordered venue changed to Bleckley County, the first county named on the prosecution's list of ten counties. Bleckley County is a small rural south central Georgia county with a Black population of only 19%.

At trial, the prosecutor used all ten (10) of his peremptory challenges on the ten (10) black venirepersons presented as prospective jurors. The prosecutor used his one (1) alternate juror peremptory challenge to strike the one black person presented as a prospective alternate juror. The focus of the prosecution's voir dire examination of black jurors was to have them struck for cause because of their views on capital punishment. He was successful in eliminating seventeen (17) of thirty-one (31) prospective black jurors for cause based on their

attitudes toward capital punishment. With the jury thus purged of black persons, Henry Willis was convicted and sentenced to death by an all white jury with all white alternates.

The further facts necessary to this brief in opposition are incorporated into the argument of the issues.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.
[As stated by Petitioner]

DID THE DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPROPERLY AMOUNT TO A CONCLUSION THAT THE GEORGIA STATUTE CONCERNING THE USE OF PEREMPTORY CHALLENGES IS UNCONSTITUTIONAL AND DID THE ELEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY CONCLUDE THAT THE RESPONDENT COULD INQUIRE INTO THE THOUGHT PROCESSES OF THE PROSECUTOR IN MAKING SUCH PEREMPTORY CHALLENGES?

Henry Willis, pre-trial, moved the trial court that the prosecutor be restricted "from using his peremptory strikes in a racially biased manner" (Ex. 1 at p. 75-76). The motion distinctly alleged that the prosecutor in this case had "over a long period of time excluded" black jurors "by a long pattern of racial discrimination in the excess [sic for exercise] of his peremptory strikes" (Ex. 1 at p. 75-76). The prosecutor "demurred" to the motion (Ex. 1 at p. 767) which operated to admit the allegations supporting the motion, for the purposes of the demurrer.

At the hearing on the motion, Henry Willis offered to present evidence on behalf of the motion (Ex. 11 at p. 2546). The trial court sustained the State's demurrer to the motion as a matter of law "even assuming the facts to be true as stated in the motion" (Ex. 11 at p. 2546; Ex. 3 at p. 800).

Henry Willis has never in any court been allowed an evidentiary hearing to prove his allegation that this prosecutor has a history and pattern of exercising his peremptory strikes to systematically eliminate black persons from trial juries.

In selecting the jury to try this case, 449 jurors were summoned, and after excusal for various reasons, there was complete voir dire of 129 jurors (98 white and 31 black). Of these 129, twenty were excused because of their attitudes against the death penalty (3 white and 17 black)[2], forty-eight were excused for prejudice, and four for other reasons, leaving fifty-six jurors the court considered competent.[3]

Under Georgia's "struck jury" system, (former) Ga. Code Ann. §§59-805 and 808, competent jurors were presented, in the order of their original summonses, to the prosecutor, who may accept or peremptorily reject them. All of the jurors were qualified before either party exercised its strikes. If a juror is accepted by the prosecutor, he is then presented to the accused, who has the option of excusing the juror. The prosecutor may exercise a maximum of ten, and the defense, twenty, such strikes. Two alternate jurors were similarly chosen, with the prosecutor allowed one, and the defendant, two, strikes for each alternate.

Following this procedure, the jury here was chosen from among the first 42 jurors determined competent by the court, pursuant to (former) Ga. Code Ann. §59-801. Of these, 32 were white, and 10 were black.

---

2. The prosecution questioned black jurors differently than he did white jurors; the fact that the prosecutor did not want black people on the jury was obvious during the voir dire examination.

3. The general figures in this paragraph and in any subsequent paragraph are supported by the transcript of the voir dire portion of the trial, and by the brief of the Attorney General of Georgia in the Georgia Supreme Court. The breakdowns into blacks and whites are based on references in the voir dire transcript, voter registration records made part of the record and on written questionaires submitted by prospective jurors, and made part of the record. (Ex. 21 and Ex. 34).

As predicted by Henry Willis' pre-trial motion and defense counsel's statement to the court, the prosecutor used all ten of his peremptory strikes to eliminate black persons, thereby leaving Henry Willis only white jurors to consider. In selecting alternate jurors, the prosecutor used one peremptory strike against the only black person presented for consideration, securing the result of an all-white jury with all white alternates.[4] This state official, the prosecutor, successfully resisted in the trial court a motion that he be forbidden from exercising his peremptory challenges "in a racially biased manner." Though it should be enough that the purposive and wholly successful actions of a state official, thus judicially immunized, in this one case plainly and grossly denied Henry Willis' right to be immune from racially discriminatory administration of law, this record further shows that Henry Willis in the same motion alleged and made an offer to prove that past actions on the part of this very official had exhibited a pattern of aiming at, and procuring, all-white juries to deal out punishment to black defendants. Even the offer was refused by the trial court. (Ex. 11 at p. 2546).

---

4. The race of the 10 jurors and one alternate peremptorily struck by the prosecutor is fully documented in the record:
1) Belinda Marshall is a black woman (Ex. 21 at p. 166);
2) Robert Lee Lindsey is a black man (Ex. 21 at p. 155);
3) Montine Durham is a black woman (Ex. 21 at p. 161);
4) Ulysses Donaldson is a black man (Ex. 21 at p. 161);
5) Maggie McClendon is a black woman (Ex. 21 at p. 166);
6) Linda Ates is a black woman (Ex. 21 at p. 158);
7) Rosetta Hobes is a black woman (Ex. 21 at p. 164);
8) Willie Ates is a black man (Ex. 21 at p. 158);
9) Winnie Carswell is a black woman (Ex. 21 at p. 157);
10) Martha Ridley is a black woman (Ex. 21 at p. 168);
11) R. B. Bullard is a black man (Ex. 21 at p. 159).

Furthermore, in response to Henry Willis' objection, the trial judge noted that the prosecutor had used all of his peremptory strikes on black persons and that Henry Willis had used his peremptory strikes on white persons [of course, since after the prosecutor's exercise of his strikes, only white jurors were left for Henry Willis to consider.] (Ex. 35 at pp. 3-5).

The Eleventh Circuit recognized the right to a hearing under Swain v. Alabama, 380 U.S. 202 (1965), however, Henry Willis is entitled to more. See cross-petition for writ of certiorari filed this date by Henry Willis.

The State seems to have articulated an excuse for the prosecutor striking each of the eleven black jurors deemed qualified by the court. A cursory reading of the State's petition might leave the impression that the prosecutor in this case would have done nothing unconstitutional to have obtained a death sentence against Henry Willis.

Prior to trial, after a Superior Court Judge held himself disqualified to preside, the District Attorney held a news conference on the courthouse steps to protest what he considered to be delays in the case. At this news conference, the District Attorney soaked a volume of the Georgia Code in gasoline and burned the law book. (See Ex. 8 at pp. 1446-1480; Ex. 14 at p. 71). This book burning was conducted by the District Attorney to prejudice Henry Willis' exercise of his right to fully litigate the case and to place blame on Henry Willis in the public's eye for the lawful and proper disqualification of the sitting judge and its attendant delay of the proceedings.

During pre-trial proceedings in this case, the Special Prosecutor, in the courtroom, assaulted one of Henry Willis' counsel with clenched fists. (See Ex. 8 at pp. 1558-1585).

Based on these actions and others, Henry Willis moved the trial court to disqualify both of these prosecutors from participating in the case; the motions were denied.

The prosecution's outrageous pre-trial actions were a mere warm up to the misconduct which would occur at trial in the presence of the jury.

In his opening statement to the jury, the District Attorney purported to describe the events leading up to the death of the victim, James Giddens. In this description, the District Attorney stated to the jury that the evidence would show that just prior to his death James Giddens begged Henry Willis to spare his life stating "This is my last day on the job. I have a wife and three small children at home." (Ex. 35 at p. 40).

The district attorney knew that no such evidence existed; no such evidence was ever presented at trial.

The first substantive witness called by the prosecutor was Mrs. Annice Giddens, the widow of the victim, James Giddens. In the presence of the jury, the prosecutor displayed to Mrs. Giddens the blood stained shirt worn by her husband at the time of his death (Ex. 35 at p. 84); the prosecutor then showed Mrs. Giddens a photograph of her deceased husband lying dead in a pond (Ex. 35 at p. 85). Mrs. Giddens became overcome with emotion and could not continue her testimony (Ex. 35 at p. 85).

The prosecutor could have had no other reason to call Mrs. Giddens as a witness and cause her emotional outburst except to prejudice Henry Willis. The prosecutor's purported sole reason for calling Mrs. Giddens was to identify the victim (Ex. 35 at pp. 86-87). Yet, the victim's identity was never in question and there were numerous witnesses who could have performed this technical function. In fact, the very next witness called, J. M. Sirmans, could have made the identification (Ex. 35 at p. 92).

However, the prosecutor had other acts of misconduct reserved for his examination of Mr. Sirmans. During this examination of Mr. Sirmans, the prosecutor questioned him about

the ages of James Giddens' children, who were uninvolved in the crime. (Ex. 35 at p. 91).

There is no way that the ages of Mr. Giddens' children could possibly have any relevance.

After this, the district attorney made reference in the presence of the jury to another unrelated highly publicized death penalty case in Bleckley County (Roosevelt Green) which had been moved on change of venue to Monrce County.

Walter Gaskins, the Sheriff of Lanier County, was called to testify concerning the circumstances of Henry Willis' arrest. In the course of his testimony, Sheriff Gaskins indicated that Henry Willis was fully cooperative after his arrest and had caused no problems (Ex. 36 at pp. 436-437). On cross-examination of Sheriff Gaskins, the district attorney engaged in the following utterly irrelevant and highly prejudicial examination:

CROSS EXAMINATION BY MR. NEUGENT:

Q. Sheriff, do you know when those photographs were made and who made them?

A. No, sir. I don't.

Q. Have you ever seen them before?

A. That's the first time I've seen these.

Q. Look at State's Exhibit No. 502. What is that?

A. (Examines exhibit) That a 22 caliber pistol. Q. And what is it made for?

A. Well, it's made to shoot.

Q. Shoot bullets?

A. Yes, sir.

Q. Have you ever seen Henry Willis, III, at the butt end of that smoking 22 pistol?

A. No, sir.

(Ex. 36 at p. 439).

Later, Captain Stewart McGlawn of the Georgia State Patrol was called to testify concerning the conditions at the scene of

Henry Willis' arrest. Cpt. McGlawn also testified that Henry Willis was cooperative (Ex. 37 at p. 551).

Again, on cross-examination of Cpt. McGlawn, the district attorney, for no reason other than to create prejudice, asked, "Have you ever seen Henry Willis on the butt end of that smoking pistol" (Ex. 37 at p. 553).

Henry Willis, took the stand at trial and testified on his own behalf. Although the district attorney was certainly entitled to conduct a thorough cross-examination of Henry Willis, he was not entitled to use cross-examination to stir up passion, prejudice and racism.

Consider the following excerpt from the cross examination of Henry Willis:

Q. What did Mr. Giddens tell you on the way to his death?

A. I don't remember him telling us anything.

Q. Didn't he tell you that it was his last day on the job?

A. No, sir.

Q. Didn't he tell you that he had a wife and three children at home?

A. No, sir.

Q. That if you'd let him go that he wouldn't hurt nobody and wouldn't tell nobody?

A. No, sir.

Q. That he would fix it to where - if you'd just let him go home to his family?

A, No, sir.

Q. He didn't tell you that?

A. No, sir.

Q. Did you know he was a married man?

A. No, sir.

Q. Had you ever seen these three children here before?

A. No, sir.

Q. Had you ever seen his wife before?

A. No, sir.

(Ex. 37 at pp. 628-629).

The prosecutor knew that that there was absolutely no evidence anywhere to indicate that Mr. Giddens had told Henry Willis about his family. This was injected solely for prejudice. There could be no conceivable relevant purpose for pointing out the Giddens family in the courtroom.

But, the prosecutor was only getting started with his unconscionable actions. The cross examination of Henry Willis continued as follows:

Q. Why did you get the gun out?

A. I don't know.

Q. Who was it called him a honkey?

A. I don't think nobody called him a honkey.

Q. You don't know about that?

A. No, sir.

Q. Who was it said that we -- 'Honkey, we've got something for you?'

A. I don't know nobody that said nothing like that.

MR. AXAM: Your Honor, unless he's willing to make an offer of proof, I think that his deliberately asking the question about 'honkey' when there is no basis for that question borders on something that I think is reprehensible. Unless he's willing to make an offer of proof, to inject in issue that this man or some of the other cohorts said, 'honkey' in any way, I object to it on that basis. He just can't ask any question in the world unless there's a foundation for it. If he has reason to believe, then I'd like him to make an offer of proof to you -- the Court.

(Ex. 37 at p. 631).

The district attorney knew that this line of questioning was false; there was no evidence anywhere that Henry Willis had used the term "honkey". This line of questioning was pursued

solely to raise racial fear and prejudice in the minds of the prosecutor's hand chosen all-white jury. This racist behavior would not have occurred had there been even one black person on the jury.

During the penalty phase of the trial, Henry Willis presented the testimony of Dr. Fay Goldberg, a psychologist. Dr. Goldberg testified concerning psychological tests she administered to Henry Willis and her professional evaluation.

In cross examination concerning these psychological tests, this prosecutor asked Dr. Goldberg, "Did you have occasion to test any of the victims?" (Ex. 38 at p. 978). Of course, the victim in this case was dead. Later, the following utterly irrelevant cross examination occurred:

> Q. That you conducted [the tests] on less than one-half of a day.
>
> A. It's a long time.
>
> Q. That's a long time?
>
> A. Three to four hours of testing is a long period of time.
>
> Q. Do you know how long Mr. James Giddens will be dead?
>
> A. Well, I don't think that's the point. I think most forensic assessments take fifteen minutes, and three to four hours is a long assessment period.
>
> Q. Do you know how long Mr. James Giddens will be dead?

(Ex. 38 at p. 982).

The prosecutor had no intention of seeking any probative evidence. More prejudice was his sole objective.

On the day of closing argument on penalty, James Giddens' son sat in the front row next to the jury dressed in a police

officer's uniform with a badge and Ray City Flag.[5] A motion for mistrial based on this incident was denied and the child was allowed to remain in the front row dressed in the police uniform (Ex. 38 at p. 996).

At his closing argument on penalty, the prosecutor could not confine his personal attacks to Henry Willis; his unconscionable remarks now extended to personal attacks on the expert witnesses and counsel for Mr. Willis.

The prosecutor labeled the expert witnesses and counsel for Henry Willis as outsiders who had no business in Bleckley County, Georgia. Among his xenophobic remarks were the following:

> Now, the same thing is true with reference to Glenn Pierce, Steve Hoenack, Robert Otto, Fay Goldberg [expert witnesses] and others that they brought in here to talk about empirical research. I don't know what that is. They've never been to Ray City, Georgia. Never been to Cochran, Georgia, before and won't be back. But I liken them, and -- the other night I was laying awake and I heard a freight train coming through town. And I thought to myself how much like a freight train Millard Farmer [Appellant's counsel] and his entourage is coming through Cochran. They will leave here in a few days. They will be gone. Ed Giddens will still be dead. (Ex. 38 at p. 1008).

The prosecutor accused the experts of trying to "brainwash" the jury (Ex. 38 at p. 1009).

The prosecutor argued about the expert witnesses:

> Now all these people came in here. They've testified for Millard Farmer before. They've worked for him before. They're working for free. They have a cause. They come here. I don't know why people closer than Minneapolis or Minnesota or Boston, Massachusetts, or somewhere -- I don't know why people that are closer don't know these facts. But apparently, they don't. But I respectfully submit to you that they are not authorized and should not be permitted to come to Cochran, Georgia, or to Ray City, Georgia, or to any other place and dictate to you what you are to do and how you are to run your system of justice.
>
> (Ex. 38 at p. 1010).

---

5. The deceased, James Giddens was a Ray City police officer.

If this prosecutor didn't intend to discriminate against Henry Willis and black people in the jury selection process, grits ain't breakfast in Bleckley County, Georgia.

II.

[As stated by Petitioner]

> DID THE DECISION BY THE ELEVENTH CIRCUIT COURT OF APPEALS ALLOWING AN EVIDENTIARY HEARING AS TO THE JURY COMPOSITION IMPERMISSIBLY ESTABLISH A NEW CATEGORY, THAT IS, A PARTICULAR AGE GROUP, AS AN IDENTIFIABLE COMMUNITY GROUP FOR PURPOSES OF JURY SELECTION?

As noted supra, Henry Willis was tried on change of venue from Lanier County in Bleckley County, the county of first choice of the prosecutor.

Prior to trial in Bleckley County, Henry Willis timely filed a challenge to the Bleckley County Traverse Jury Pool, alleging, among other things, that young adults age 18 - 30 were unconstitutionally underrepresented in the jury pool.

At the hearing on Henry Willis' jury composition challenge, the State stipulated that while young adults age 18-30 constituted 35.1% of the jury eligible population in Bleckley County, they constituted only 10.1% -- an absolute underrepresentation of 25% -- of the traverse jury pool from which Henry Willis' trial jury was drawn. (Ex. 20 at pp. 369-370, 374; Ex. 21 at p. 172). The state trial court found these figures as fact. (Ex. 3 p. 942).

This 25% underrepresentation is within the range of disparities found significant in cases involving underrepresentation of other cognizable groups. E.g. Alexander v. Louisiana, 405 U.S. 625 (1972); Whitus v. Georgia, 389 U.S. 545 (1967); Hernandez v. Texas, 347 U.S. 475 (1954).

The state trial court, based on Georgia Supreme Court cases, held as a matter of law that young adults age 18 - 30 do not constitute a cognizable group. (Ex. 20 at p. 378). Based on

this ruling the trial court refused to hear any evidence whatscever to show that young adults age 18 -30 constitute a "cognizable" group and that there was a history on past jury lists in Bleckley County of systematic underrepresentation of young adults age 18 - 30; Henry Willis offered to present such evidence and attempted to present such evidence. (Ex. 20 at pp. 374-380).

The paramount purpose of the requirement that a jury represent a fair cross section of the community is to insure impartial juries in criminal prosecutions and full community participation in the administration of criminal law. Taylor v. Louisiana, 419 U.S. 522, 530-531 (1975), see Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). The systematic exclusion of an identifiable group in the community violates the cross section requirement.

Henry Willis' counsel,in oral argument before the state trial court, explained the reasons why the representation of young adults age 18 - 30 on the jury were necessary to a fair trial: Henry Willis, a young black man, was being tried for his life in a rural south Georgia town. Only the young adults in the community had grown up in a desegregated society; they were the only white group eligible for jury duty who had attended desegregated schools and had an opportunity to socialize with black persons. They would be in the best position of any white persons to view Henry Willis in human terms and understand his background and character in making the sensitive life-death judgment. Knowing that the prosecutor was going to strike all black persons from the jury (See Issue I, supra), Henry Willis saw young adults as the only group that he could hope would understand the mitigating circumstances to be presented in his case. (Ex. 20 at pp. 417-425). The prosecutor wanted and got an old-time-thinking white jury.

In Hernandez v. Texas, 347 U.S. 475 (1954), this Court, in discussing whether Mexican Americans constituted a cognizable group in a Texas community, held that whether a particular group is cognizable is question of fact to be determined from evidence:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existences of a distinct class is demonstrated, and it is further shown that the laws as written or as applied single out that class for different treatment not based on some reasonable classifcation, the guarantees of the Constitution have been violated. . .
>
> 347 U.S. at 478.

Cf. Ciudadanos Unidos de San Juan v. Hidalgo Cty., etc, 622 F.2d 807, 181 (5th Cir. 1980), cert. denied 450 U.S. 964 (1981), where the Fifth Circuit, citing Hernandez, held that young adults had the right to present evidence to show that they constituted a cognizable group with a right to adequate represetnation on county jury lists.

All that the Eleventh Circuit has done in Henry Willis' case is to enter an order, virtually interlocutory in nature, allowing Henry Willis to return to the United States District Court and present the evidence he has never been allowed to present in any court; to prove that young adults constitute a cognizable group in Bleckley County, Georgia, a county with a history of racial discrimination.

The Eleventh Circuit has not created any new category and has not expressed any opinion on whether Henry Willis can meet his burden of proof. All that has been granted to Henry Willis is his right under Hernandez to meet the burden of proof.

The Eleventh Circuit has retained jurisdiction of the appeal and will review the district court's final order. At this intermediate stage, the issues and facts have hardly been crystalized into any final form appropriate for review by this Court.

CONCLUSION

WHEREFORE, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Millard Farmer
Joseph M. Nursey
COUNSEL FOR HENRY WILLIS

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 18th day of April, 1984.

Joseph M. Nursey
COUNSEL FOR HENRY WILLIS

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

WALTER D. ZANT, WARDEN, *

Petitioner *

* No. 83-1558

v. *

HENRY WILLIS, III, *

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Henry Willis, III, by his undersigned counsel, asks leave to proceed in this Court in forma pauperis. Respondent's affidavit of indigency is attached to this motion.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer

COUNSEL FOR RESPONDENT

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1558

WALTER D. ZANT, Warden
Georgia Diagnostic and
Classification Center,

Petitioner,

v.

HENRY WILLIS, III,

Respondent

AFFIDAVIT OF INDIGENCY

I, HENRY WILLIS, III, being first duly sworn, depose and say that I am the Respondent in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ___ No ✓

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

1975; $400 per month

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No ✓
b. Rent payments, interest or dividends? Yes ___ No ✓
c. Pensions, annuities or life insurance payments? Yes ___ No ✓
d. Gifts or inheritances? Yes ✓ No ___
e. Any other sources? Yes ___ No ✓

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. $25 from family

3. Do you own cash, or do you have money in a checking or savings account? Yes ✓ No ___ (Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned. $12.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No ✓

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 11, 1984

Henry Willis III
HENRY WILLIS, III

Sworn to and subscribed to before me this 11 day of April, 1984.

NOTARY PUBLIC

My commission expires:

3-20-87

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 18th day of April, 1984.

Joseph M. Nursey
COUNSEL FOR HENRY WILLIS

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WALTER D. ZANT, WARDEN, *

Petitioner *

* No. 83-1558

v. *

HENRY WILLIS, III, *

Respondent *

AFFIDAVIT OF TIMELY FILING

Before me the undersigned authority, personally appeared Joseph M. Nursey, who after being duly sworn deposes and states:

1. I am a member of the Bar of this Court.

2. Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari in the above-styled case was deposited in the United States mail with adequate first class postage attached, at the United States Post Office on Marietta Street in Atlanta, Georgia on April 18, 1984. The Brief in Opposition was mailed within the time period allowed by the Rules of this Court for filing a Brief in Opposition.

JOSEPH M. NURSEY

Sworn to and subscribed to before me
this 18th day of April, 1984.

Pamela Ann Tumblin
NOTARY PUBLIC

My commission expires: Aug 22, 1984